

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

MAR 18 1998

IN THE MATTER OF:

DOCKET NUMBER: 97-01370

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His Active Duty Service Commitment (ADSC) of 30 October 1998 be voided.

APPLICANT CONTENDS THAT:

The ADSC was added to his record without his knowledge; that he was never counseled by the Military Personnel Flight (MPF) on this ADSC; and that he never signed an AF Form 63 (Officer Active Duty Service Commitment Counselling Statement) committing him to this ADSC.

Applicant's complete statement is set forth in Item 9 of his application for correction of his military records (Exhibit A).

STATEMENT OF FACTS:

On 7 August 1995, applicant, a captain, was selected for an assignment to Peterson AFB CO to fly the C-21 aircraft. This required him to attend Initial Qualification Training (IQT) in the C-21 graduating October 1995. As a result of this training, he incurred a three-year ADSC of 30 October 1998.

According to the Training Management System (TMS), applicant graduated from the C-21 course on October 1995 and the ADSC was automatically updated in the Personnel Data System (PDS) in October 1996. Therefore, he could have known of the existence of the 30 October 1998 ADSC since October 1996.

Item 16, Remarks, of his travel orders authorizing his attendance at the training stated "ADSC: 36 MONTHS."

AIR FORCE EVALUATION:

HQ AFPC/DPPRP explains the reasons for establishment of ADSCs, sets forth the applicant's previous experience with ADSC-incurring training and recommends that the application be denied. That

office states, in part, that the three-year ADSC was clearly stated in AFI 36-2107, Table 1.5, Rule 8. An assignment notification message was sent to the Dover AFB MPF on 10 August 1995 with instructions to counsel applicant on the ADSC to be incurred for both permanent change of station (PCS) and training, citing the specific tables and rules in AFI 36-2107 to be used to compute the ADSCs. An additional assignment notification was sent to Dover AFB, MPF, via trailer remarks through the PDS on 7 August 1995. This notification also provided the MPF with instructions to counsel applicant on the ADSC to be incurred for both PCS and training. Counselling is normally accomplished during PCS relocation counseling necessary to prepare members' orders and to resolve any issues related to the upcoming PCS.

Additionally, applicant was scheduled to attend the C-5 training via TMS, with a Training Line Number KB0R30575. This generated a training allocation notification RIP, which clearly indicated a three-year ADSC would be incurred, and applicant was required to initial the following statements on the RIP, "I accept training and will obtain the required retainability" and "I understand upon completion of this training I will incur the following active duty service commitments (ADSC)". This quota allocation is also filed in the relocation folder.

Relocation folders are destroyed a few months after the member's departure. Therefore, the folders are unavailable for them to review to determine exactly what information was provided to applicant regarding either the PCS counseling or the training counseling. Although MPFs are supposed to forward copies of AF Forms 63 to the officer's permanent files (at unit level and at AFPC), they sometimes neglect to do so; sometimes - as is alleged in this case - they fail to even accomplish an AF Form 63. Although documentation of counseling does not exist and applicant denies that it occurred, they believe it's a reasonable presumption that competent counseling was provided and that applicant was in fact aware of the ADSC which would be incurred based on the number of redundant notifications sent to the MPF. Furthermore, given the routine nature of ADSCs, the common acknowledgment by Air Force personnel, and applicant's previous experience of receiving ADSCs for flying training on three different occasions, they are highly skeptical of any claim of unawareness regarding the ADSC.

They also have written evidence that the applicant was provided information regarding the ADSC he would incur as a result of the training he would attend. Specifically, the TDY travel order which sent him to C-21 pilot initial qualification training (see Atch 11). In the "remarks" block of those orders (item #16) is the annotation "ADSC: 36 months." Applicant received these orders prior to departure for training, so it is difficult for them to understand any claim of ignorance regarding the ADSC he would incur.

Furthermore, it is unlikely he could have avoided all discussions - either before or during PCS or training - among colleagues,

classmates, or instructors which alluded - even informally - to the association of a three-year ADSC with the C-21 training. It is also unlikely that, even if he had initially been ignorant of the length of the ADSC, he would have blithely proceeded with the training after encountering such allusions, and failed to seek clarification of this status regarding the ADSC.

In applicant's case, he still had an Undergraduate Pilot Training (UPT) ADSC of 14 February 1998 and a C-5 flying training commitment of 18 May 1998 at the time he was selected for this assignment. Had he declined the assignment, he may have been placed in a non-flying position for the balance of his commitment (over two and a half years). They are skeptical that he would have elected such an alternative, particularly since the three-year ADSC he was considering extended only five months beyond his existing UPT ADSC. Further, they note that applicant does not assert that he would have declined the assignment if briefed on the ADSC - in fact, he doesn't even assert ignorance of the ADSC. Therefore, in addition to doubting the validity of any claim of unawareness he may state in rebuttal to this advisory, they assert that he suffered no harm from what amounts to a clerical error in the documentation of the ADSC counseling.

ADSCs for flying training are normally updated automatically upon graduation from the training course, via the TMS. According to TMS, applicant graduated from the C-21 course on October 1995 and the ADSC was automatically updated in the PDS in October 1996; that PDS update generated an ADSC change notification RIP which was produced at his duty location (Peterson AFB) for forwarding to him, so he has apparently known of the existence of the 30 October 1998 ADSC since October 1996. Although they are unable at this late date to verify the RIP was produced and delivered to applicant, they again rely on a reasonable presumption of regularity that the automated computer product was in fact produced and that, in accordance with routine administrative procedures, it was provided to applicant. Furthermore, having verified that the ADSC was properly recbrded in the PDS in October 1996, they submit that existence of the ADSC was easily discoverable by applicant since that time by a simple review of his own records. Although such review is no longer mandated, a prudent officer accomplishes such reviews from time to time (Exhibit C with Attachments 1 through 13).

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant states, in part, that in August 1995, he was selected by the AFPC for a new assignment flying C-21s at Peterson AFB, CO. At that time, he was a C-5 Instructor Pilot at Dover AFB, DE. He was notified of his assignment verbally and told to call the base MPF to coordinate the TDY/PCS orders. Throughout the assignment process, he was never informed or counseled on any ADSCs required for this assignment.

Up to that point in his military career, all ADSCs that he incurred were presented to him at a formal briefing. At those briefings, he was informed of the ADSC and given a choice to accept the training and associated commitment, or reject it and wait for other training opportunities. Since he had already qualified in the C-12 (similar aircraft and mission) during his first assignment after pilot training, he did not expect any additional commitments, and did not find it unusual when he was not informed or counseled. Also, he is not an expert on MPF regulations to make the determination whether an ADSC applies or not.

He completed the training course on 26 October 1995 and arrived at Peterson AFB, CO, in November 1995. The first time he reviewed his personnel records at Peterson AFB was in October 1996. At that time, all his ADSCs were correct (Atch 1). The next time he looked at his records in February 1997, a new commitment dated 98 Oct 30 had appeared in his records (Atch 2). He asked Peterson AFB MPF to explain to him the origin of that commitment. They told him that it was for a C-21 training class he had completed 16 months earlier. He did not understand how that commitment was added to his records without his knowledge or acceptance. He was never informed or counseled on that ADSC, he never completed an AF Form 63, and never signed any paperwork establishing a contract between himself and the USAF for this training.

Since Peterson AFB MPF could not explain the undocumented ADSC, they instructed him to contact AFPC to resolve this problem. Over a period of three months, all attempts to resolve this problem with AFPC were not properly addressed and he was told to submit a DD 149.

In justifying the removal of this ADSC, he cites specific paragraphs of the governing AFI that the Air Force failed to comply with and argues that compliance is mandatory as directed by USAF/CC directives.

Attachment 3 is a message sent from HQ AFPC/DPP to all MPFs on the subject of "Management of the Officer Active Duty Service Commitment Program". Paragraph 3 requests MPF attention in following AFI 36-2107 guidelines. The following is highlighted in this message "If an Officer requires training, it is Mandatory for him or her to be counseled and sign an AF Form 63, Officer Active Duty Service Commitment (ADSC) Counseling Statement, prior to departing TDY..." This clearly reaffirms HQ AFPC's position on the requirement to be counseled prior to training and the need to document it on an AF Form 63.

Attachment 4 is an extract of a slide presentation given by the Chief, Retirements and Separations Division, HQ AFPC. In this presentation, the chief reaffirms the "AF Intent: members be counseled prior to incurring ADSCs, and they voluntarily incur the ADSC." In addition, "AFI 36-2107 directs documentation of ADSC counseling on AF Form 63 (unless otherwise specified in the AFI)."

Attachment 5 is a message sent from HQ AFPC/DPSFM to all MPFs on the subject of "Management of Active Duty Service Commitment (ADSC) Program." Paragraph 2 directs the use of plain English statement describing the ADSC to be incurred. It reads "You will incur the following ADSC IAW AFI 36-2107 for this training () Years () Months." This statement is not on his TDY/PCS orders. The obscure notation found in his orders was never brought to his attention, nor does it clearly specify that he will incur a commitment. [NOTE: This message was sent to the MPFs well after applicant's TDY orders were issued] As an officer, he is required to obey all lawful orders, written or verbal, regardless of his agreement with the order. Orders are issued to an individual for compliance, not for agreement or signature. Therefore, it is not a valid voluntary agreement between him and the USAF.

Based on USAF regulation AFI 36-2107, the burden rests with the USAF to ensure that individuals are properly counseled. Full compliance with this regulation will ensure that all individuals are counseled on all ADSCs and incur such commitments freely. Part of this counseling involves the signing of the AF Form 63 that becomes the legal binding contract between the USAF and the individual. Since no such contract exists between him and the USAF, how can he be responsible for something he never agreed to? Therefore, the ADSC dated 30 October 1998 should be deleted.

The AFPC advisory opinion alleges that under normal procedures, many RIPs regarding this ADSC were produced and should be part of his personnel records. Such RIPs would have been given to him at Dover AFB and Peterson AFB. Why is it then, not a single copy of such documents can be found in his personnel records?

In response to AFPC's statement that "We cannot detect any significant harm which he has experienced or will experience as a result of serving his commitment," he advises that he has been hired by the United States Air Force Reserves at Dover AFB, DE, as a C-5 pilot. All agreements were based on his separation from the USAF in May '98. He will lose that job if he is not able to start C-5 requalification training by May 98.

In summary, applicant states that he was not aware of this ADSC. He was not properly counseled and never signed an AF Form 63 or any other contract between him and the USAF. To this day, no attempts have been made by the USAF to counsel him as directed in AFI 36-2107, Chapter 1, Paragraph 1.9.5. Nor has AFPC been able to find any documents to support any of their assumptions. Applicant's complete statement is included as Exhibit E with Attachments 1 through 5.

ADDITIONAL AIR FORCE EVALUATIONS:

On 5 December 1997, copies of the United States District Court for the Eastern District of California decision in the case of Captain David T. DeGavre v. Sheila Widnall and a recent AFPC/JA opinion

concerning the impact of this decision on applications for removal of ADSCs were forwarded to the applicant for review and comment (Exhibit F with Attachments 1 & 2).

In discussing the court case, HQ AFPC/JA states, in part, that as a litigation matter, the decision has limited precedential value simply because it is a single U.S. District Court decision; i.e., technically, the case must be followed only in that district where the decision was rendered. Nevertheless, in their view, the case may be cited as persuasive authority (that is, the reasoning is sound and emanates from a distinguished federal court) for two basic propositions: (a) Pursuant to AFR 36-51, para (4)(b), the absence of an Air Force Form 63 and even the absence of evidence of ADSC counseling do not compel the invalidation of an ADSC; and (2) Evidence that an officer benefited from training and acted unreasonably in failing to investigate the length of his ADSC are valid reasons for denial of an ADSC appeal.

The bottom line for the AFBCMR? They are not obligated to follow the Court's decision in the DeGavre case; however, that case provides the best (and only, at this point) judicial precedent available anywhere and would constitute persuasive authority to support future BCMR decisions to deny ADSC waiver requests under similar circumstances. They would analogize this situation to that facing the AFBCMR following the court's decision in Detweiler V. Pena, 38 F.3d 591 (D.C.Cir. 1994) - wherein it was determined that the Board would follow that decision notwithstanding that it too was only a single court decision that the Board could have arguably chosen to ignore. Thus, like Detweiler, although the DeGavre decision has, in a technical sense, only limited precedential value for litigation purposes, it provides legitimate persuasive authority to cite in support of the rationale explained therein (See Attachment 2 to Exhibit F).

APPLICANT'S RESPONSE TO ADDITIONAL AIR FORCE EVALUATIONS:

Applicant advises that he does not wish to add any additional information to his existing case (Exhibit G).

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of a probable error or an injustice warranting favorable action on the applicant's request that his ADSC of 30 October 1998 be voided. Applicant's contention that the ADSC was added to his record without his knowledge; that he

was never counseled by the MPF on this ADSC; and that he never signed an AF Form 63 (Officer Active Duty Service Commitment Counseling Statement) committing him to this ADSC appears to have merit. Because of the reasons stated hereinafter, however, we do not find the lack of counseling and the failure to sign the AF Form 63 acknowledging the ADSC sufficiently compelling to conclude that his ADSC should be voided.

4. The Air Force admits that no documentation exists to prove that the applicant was counseled of the three-year ADSC for attending IQT. Nonetheless, because of the applicant's extensive experience with ADSC-incurring events, the elaborate procedures in place to ensure counseling, the Air Force speculates that the applicant was indeed aware of the three-year ADSC notwithstanding the lack of documentary evidence of that awareness. The Air Force notes that the three-year ADSC was timely recorded in the PDS in October 1996 and was available for discovery during any records review as is prudently accomplished from time-to-time by most officers: Lastly, the Air Force notes that the applicant's TDY orders which sent him to the training are annotated in the remarks block: "ADSC: 36 months"; and that the applicant received these orders prior to departure for training. Therefore, it is difficult for them to understand any claim of ignorance regarding the ADSC he would incur.

5. In interpreting a recent court decision concerning the validity of imposing ADSCs for training programs in the absence of documented counseling, AFPC/JA concedes that the decision must be followed only in the district where it was rendered. Moreover, it is the view of AFPC/JA that this decision is not binding on us in any manner. Nevertheless that office believes the decision may be cited as persuasive authority (that is, the reasoning is sound and emanates from a distinguished federal court) for two basic propositions:

a. Pursuant to the prevailing regulation/instruction, the absence of an Air Force Form 63 and even the absence of evidence of ADSC counseling do not compel the invalidation of an ADSC.

b. Evidence that an officer benefited from training and acted unreasonably in failing to investigate the length of his ADSC are valid reasons for denial of an ADSC appeal.

In deference to the legal expertise of AFPC/JA, the applicant appears to have no legal right removal of his ADSC because of the Air Force's failure to properly counsel him and give him the opportunity to accept or decline the C-21 IQT. Since we are empowered to grant relief based on injustice, however, the lack of a legal entitlement is not totally dispositive of the merits of his case.

6. Unfortunately for the applicant, we find no error or injustice in the imposition of the three-year ADSC for his

completion of the C-21 IQT. The evidence supports the fact that the applicant was not timely counseled as required by the prevailing Air Force Instruction. Nonetheless, as noted by the Air Force, the three-year ADSC was updated in the PDS in October 1996, and he could have known of its existence as of that month. Moreover, the TDY orders that he received and presumably carefully reviewed to determine his reporting date for the IQT and his entitlements indicate an ADSC of 36 months. In view of the foregoing, we believe the applicant was aware of the three-year ADSC prior to attending the flying training, but, for reasons of his own, failed to timely raise the issue. Therefore, we conclude that the applicant was aware of the three-year ADSC notwithstanding the lack of counseling by his MPF; and that he is obligated to serve the ADSC unless sooner relieved by competent authority.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 12 February 1998, under the provisions of AFI 36-2603:

Mr. LeRoy T. Baseman, Panel Chairman
Mr. Benedict A. Kausal, IV, Member
Mr. Henry Romo, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 2 May 1997, with Attachments.
Exhibit B. Microfiche Copy of Applicant's Master Personnel Records.

- Exhibit C. Letter, HQ AFPC/DPPRP, dated. 10 September 1997,
with Attachments.
- Exhibit D. Letter, SAF/MIBR, dated 29 September 1997.
- Exhibit E. Letter from Applicant dated 15 October 1997,
with Attachments.
- Exhibit F. Letter from AFBCMR, dated 5 December 1997, with
Attachments.
- Exhibit G. Letter from Applicant, dated 8 December 1997.


LEROY T. BASEMAN
Panel Chair